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**MEMORANDUM OF LAW**

**DATE:** March 19, 2004

**TO:** Mark Koll, Associate Civil Engineer, Transportation Department

**FROM:** City Attorney

**SUBJECT:** Carroll Canyon Road Extension

**QUESTION PRESENTED**

You have requested an opinion from our Office on whether the City of San Diego's [City's] proposed Carroll Canyon Road Extension project [Project] is subject to the requirements of the National Environmental Policy Act [NEPA]. This memorandum addresses that issue.

**SHORT ANSWER**

No. The Project is not subject to NEPA. First, the approval of federal funding for the Project did not, by itself, federalize the Project. Second, the Project is not sufficiently connected to another federal project to warrant concurrent consideration as a single federal project for the purposes of NEPA.

**BACKGROUND**

The proposed Project will extend Carroll Canyon Road from its existing intersection with Scranton Road, to the intersection of Sorrento Valley Road in the vicinity of the southbound Interstate 805 [I-805] on and off ramps. *See* aerial overlay attached as Exhibit A. The Traffic Impact Analysis [TIA] for the Project, which predicts the traffic impacts of the Project in the years 2005 and 2020, indicates that the Project will have no impact in year 2005, but will increase traffic from Sorrento Valley Road to the southbound I-805 on-ramp in year 2020. *See* TIA, pages 59-60, 68-69, attached as Exhibit B. I-805 is part of the federal Interstate Highway System [IHS]. Therefore, improvements to the I-805 access ramps are subject to federal regulation, oversight and approval by the Federal Highway Administration [FHWA]. Consequently, the City is being required by the California Department of Transportation [CalTrans] to widen the southbound I-805 ramps [Ramp Widening] to accommodate the

additional traffic from the Project.<sup>1</sup> The projected cost of the Project is \$14,398,508. *See* cost estimate attached as Exhibit C. The projected cost of the Ramp Widening is \$1,283,265. *Id.*

At the initial stage of development of the Project, the City applied for and obtained approval from the FHWA for partial funding of the Project's construction costs. Subsequent to FHWA approval, however, the City obtained a preliminary determination from Jeff Lewis, the local FHWA administrator, that if the Project was not federally funded NEPA review would not be required. *See* e-mail from Jeff Lewis, dated August 21, 2002, attached as Exhibit D. Based upon Mr. Lewis's determination, and after obtaining approval from the local administrator for the state's allocation of federal highway funds,<sup>2</sup> the City negotiated an agreement with the City of Carlsbad to swap the City's allocation of federal funding for the Project with an equivalent amount of local funds from the City of Carlsbad.<sup>3</sup> Mr. Lewis was then succeeded by Cesar Perez, who concluded that NEPA review should be required for the Project/Ramp Widening because of the Project's traffic impacts on an interstate highway, but he would still abide by Mr. Lewis's original determination. *See* January 6, 2004, CCR PDT Minutes, Item 2, attached as Exhibit E.

In light of the conflicting advice by FHWA, you have asked us for an independent opinion on whether the Project is subject to NEPA requirements.

### ANALYSIS

Pursuant to 42 U.S.C.A. section 4332(2)(C), NEPA only applies to "major Federal actions significantly affecting the quality of the human environment." "Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. 40 C.F.R. § 1508.18. The term "major" reinforces but does not have a meaning independent of the term "significantly." *Id.* Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies. 40 C.F.R. § 1508.18(a).

If the Project were to be challenged based upon the ground that the City should have complied with NEPA requirements, a federal reviewing court is likely to focus on the following issues: (1) whether federal approval of Project funding constituted a "major Federal action significantly affecting the quality of the human environment;" and (2) whether there is a sufficient nexus between the Project and the Ramp Widening to federalize the Project notwithstanding the City's withdrawal of federal funding.

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<sup>1</sup>CalTrans is the agency designated with responsibility to ensure that interstate highway projects are developed in accordance with FHWA requirements. 23 C.F.R. § 771.109(d).

<sup>2</sup>The San Diego Association of Governments [SANDAG] is the local administrator of state allocated federal highway finds for the County of San Diego.

<sup>3</sup>The primary purpose of the swap is to preserve an amount equivalent to the City's allocation of federal funding because the City of Carlsbad has an eligible project that is ready to accept federal funding while the City is behind schedule on the Project.

**I. FHWA approval of allocation of federal funding for the Project did not, by itself, constitute a “major Federal action significantly affecting the quality of the human environment.”**

Two statutory approvals are required for federal funding of interstate highway systems. The first, commonly referenced as the “program approval,” does not commit the federal government to provide federal funds, but results in the reservation of previously apportioned federal funds for a project. 23 U.S.C. § 105(a). The second statutory approval, commonly referenced as the “plan, specification and estimate [PS&E] approval,” results in a contractual obligation of federal funds for the project after program approval has been obtained. 23 U.S.C. § 106(a). According to staff of the Traffic and Engineering Department [TED], the City obtained program approval from the FHWA for the Project, which means that federal funds were reserved, but not committed for the Project. The issue thus becomes whether FHWA’s program approval constituted a “Major Federal Action significantly affecting the quality of the human environment.”

The extent of federal approval necessary to constitute a “major Federal action” was discussed by the court in *La Raza Unida of Southern Alameda County v. Volpe*, 488 F.2d 559 (9<sup>th</sup> Cir. 1973), *cert. denied*, 417 U.S. 968 (1972). In that case, the proponents of the highway project argued that compliance with NEPA could be avoided if the project was withdrawn from the federal aid system before actual receipt of funds. The court rejected that argument and held that where the state highway commission had already obtained program approval and held a public hearing required by federal regulation to approve the location of a highway through a city (a step required before PS&E approval), it was too late for the state to avoid compliance with NEPA by withdrawing the project from the federal aid system. *Id.* at 562. Although the court declined to address whether “program approval,” alone, could constitute the “major Federal action” sufficient to trigger NEPA, the court established a standard for withdrawal of a project from the federal aid system, holding that “withdrawal must be clear and unambiguous and prior to causing significant harm either to those who might be displaced by the project or to the environment....” *Id.* at 563. In other words, the court determined that the triggering event for NEPA was the public hearing on the location of the highway through a city because of its impact on displacing residents from their homes.

In light of the fact that the City only obtained program approval and did not take any further steps in the federal approval process, it is unlikely that the program approval, alone, constituted a “major Federal action,” triggering NEPA review. Furthermore, the swap of federal funding between the City and City of Carlsbad, which has already been approved by the local administrator of federal highway funds, should constitute the unequivocal withdrawal of federal aid mandated by the *La Raza* court.

**II. The Project is not sufficiently connected to the Ramp Widening to federalize the Project for NEPA purposes notwithstanding the City's withdrawal of federal funding.**

If the City swaps its federal funding with the City of Carlsbad, effectively withdrawing its allocation of federal funds, the Project will no longer be federally funded. However, the City's TIA indicates that in the year 2020, the Project will cause an impact on the southbound I-805 ramps, which are part of the IHS system and therefore subject to federal regulation. The issue thus becomes whether the Project's projected traffic impacts to the Ramp Widening federalizes the Project notwithstanding the Project's local funding.

Pursuant to 40 C.F.R. part 1508.25, in determining the scope of an environmental impact statement required by NEPA, agencies must consider actions which may be "connected actions." Connected actions are ones that are closely related and therefore should be discussed in the same impact statement. 40 C.F.R. §1508.25(a)(1). Actions are connected if they:

- (i) automatically trigger other actions which may require environmental impact statements;
- (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; or
- (iii) are interdependent parts of a larger action and depend on the larger action for their justification. *Id.*

Unfortunately, "[t]here are no clear standards for defining the point at which federal participation transforms a state or local project into a major federal action." *Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 960 (9<sup>th</sup> Cir. 2002)(citing *Almond Hill Sch. v. United States Dept. of Agriculture*, 768 F.2d 1030, 1039 (9<sup>th</sup> Cir. 1985)). The matter is simply one of degree. *Id.* Marginal federal action will not render otherwise local action federal. *Id.* Where federal funding is not present, the court has generally been unwilling to impose the NEPA requirement. *Almond Hills School v. U.S. Dept. of Agriculture*, 768 F.2d 1030, 1039 (9<sup>th</sup> Cir. 1985) (citing *State of Alaska v. Andrus*, 591 F.2d 537, 541 (9<sup>th</sup> Cir. 1979)). Therefore, to make this determination, courts will look to the nature of the federal funds used and the extent of federal involvement.

**A. The disparity of expenditure between the Project and Ramp Widening weighs in favor of separate consideration.**

As a general rule, courts will consider projects as "connected actions" only if there is significant federal funding in each individual action. For example, in *Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955 (9<sup>th</sup> Cir. 2002), the court found that federal funding of preliminary studies for a significantly larger state funded project did not federalize the state funded project for NEPA purposes. While "significant federal funding" can turn what could otherwise be a state or local project into "major Federal action," consideration must be given to any great disparity between the forecasted expenditures for the non-federally and federally funded projects. *Ka Makani* at 960 (citing *Alaska v. Andrus*, 591 F.2d 537, 540 (9<sup>th</sup> Cir. 1979)). In the present case, the estimated Project cost is \$14,398,508 while the estimated projected cost

of the Ramp Widening is \$1,283,265 or less than eleven percent of the Project cost. Therefore, the great disparity of expenditure should weigh in favor of separate consideration of the Project and Ramp Widening for NEPA purposes.

**B. The Project and Ramp Widening are not sufficiently interrelated to constitute a single project for NEPA purposes.**

Courts will also consider projects as “connected actions” if a non-federal project is significantly interrelated to a federally funded project. For example, in *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 327-29 (9<sup>th</sup> Cir. 1975), the court considered whether state funded improvements to an airport (terminal and parking garage) were “so closely interwoven” with the airport projects receiving federal funds to make the entire development program a “major Federal action” for NEPA purposes. “Determination of whether federal and state projects are sufficiently interrelated to constitute a single ‘federal action’ for NEPA purposes will generally require a careful analysis of all facts and circumstances surrounding the relationship. At some point, the nexus will become so close, and the projects so intertwined, that they will require joint NEPA evaluation.” *Id.* Applying the above standard, the court concluded that even though the federal and state expansion projects would have adverse traffic impacts on each other, that fact alone was not enough to federalize the state funded part of the airport expansion program. *Id.* Therefore, the fact that the Project will have an adverse traffic impact on the southbound I-805 ramps should not be enough to federalize the Project for NEPA purposes.

**C. The Project and Ramp Widening have independent utility.**

In the context of interstate highway systems, the ninth circuit federal court has applied the following “independent utility” standard to determine whether a system of roads should be evaluated under one Environmental Impact Statement [EIS] for NEPA purposes:

In some situations the relationship of several roads or parts of a road may be so interrelated that no one road or part of a road can function as an efficient carrier of motor vehicles except in conjunction with the others. In such a case, it is possible that it would be necessary to have an EIS which would have as its subject all of the roads or parts of roads which could only function efficiently as a unit. In such an unusual situation, the several roads would not constitute a system of highways but would essentially be treated as a single highway for the purpose of the EIS.

*Daly v. Volpe*, 514 F.2d 1106 (9<sup>th</sup> Cir. 1975)(citing *Movement Against Destruction v. Volpe*, 361 F.Supp. 1360 (D.Md. 1973)).

Applying the “independent utility” standard, a reviewing court would likely consider two factors weighing in favor of separate consideration of the Project and Ramp Widening for NEPA purposes. The first factor is that when the Project is complete, Carroll Canyon Road will have independent utility from the southbound I-805 ramps because the Project will merely connect Carroll Canyon Road to Sorrento Valley Road and will not alter the southbound access point to I-805. The second, but related factor is that the projected traffic increase on the southbound I-805 ramps will not occur until 2020, which is further evidence that the Carroll Canyon Road extension and southbound I-805 ramps have independent utility.

**D. Federal involvement in the Project decision making was minimal.**

Finally, courts will also consider projects as “connected actions” if there is significant federal involvement in the decision making process of the non-federally funded project. For example, in *Almond Hill School v. U.S. Dept. of Agriculture*, 768 F.2d 1030, 1039 (9<sup>th</sup> Cir. 1985), the court looked at whether the use of federal funds to pay the salaries of three federal officials who sat on the state’s eight member advisory board for beetle eradication qualified as a “major Federal action.” The Court found that the recommendations and advice given by the federal members were marginal at most and, therefore, did not federalize a state funded project for NEPA purposes. *Id.* In the context of the Project, the FHWA has not been involved in any decisions involving the planning or design of the Project, thus weighing in favor of separate consideration from the Ramp Widening for NEPA purposes.

**CONCLUSION**

NEPA only applies to “major Federal actions significantly affecting the quality of the human environment.” The approval of federal funding for the Project did not, by itself, constitute a “major Federal action.” Furthermore, the City’s swap of its allocation of federal funds constituted sufficient withdrawal of the Project from the federal aid system. Additionally, the Project is not sufficiently connected to the Ramp Widening to federalize it for NEPA purposes due to the following facts: the estimated cost of the Ramp Widening is less than six percent of the estimated Project cost; the Project will not have any impacts on the southbound I-805 ramps until year 2020; and the FHWA did not have decision making involvement in the Project planning or design.

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By

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